

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7103
77-7115

ORIGINAL

United States Court of Appeals

For the Second Circuit

CANDACE VAN ALLEN,

*Plaintiff-Appellant/
Cross-Appellee,*

against

DOMINICK & DOMINICK, INCORPORATED
and PAUL deGIVE,

*Defendants-Appellees/
Cross-Appellants.*

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF
DEFENDANTS-APPELLEES/CROSS-APPELLANTS

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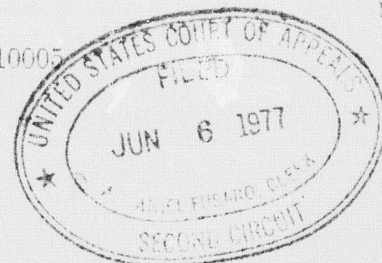


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BRIEF OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS

Preliminary Statement

Plaintiff Candace Van Alen ("Van Alen") brought this action against her brokers of 17 years, Paul deGive and Dominick & Dominick, Inc. ("Dominick"), to recover losses incurred in her securities accounts during the bear market of 1969-1970. A series of complaints were filed, culminating in a Third Amended Complaint (R. 1,* hereinafter the "complaint") which was tried to the Hon. Lawrence W. Pierce, of the United States District Court for the Southern District of New York, from November 8, 1976 through November 17, 1976. The essence of plaintiff's case was that deGive, after having had a discretionary power over plaintiff's account since 1953, had, in 1969, turned fraud. Plaintiff accused defendants of "churning" her accounts and falsely representing that they had

* "R." refers to the Index of Record on Appeal herein.

developed a system which guaranteed profits. She also contended that defendants' violation of certain technical New York Stock Exchange Rules ("NYSE") made them insurers against the losses suffered by plaintiff. Judge Pierce dismissed the complaint as "without merit" in a thirty-eight page opinion that vindicated defendants' integrity. Noting that "[i]n prior cases brokers have been accused of fraudulently pledging to handle the account as if it belonged to a member of their own family," Judge Pierce held that "[h]ere deGive did make such a promise, but it was not fraudulent and he did act in accordance with that commitment." (A. 804, Op.).* The court found "that there were losses [in plaintiff's account] in the bear market of 1969-70....," but that "the evidence presented at trial establishes that the losses suffered by plaintiff were the result of a skittish and unfavorable stock market...." (A. 809, Op.). Plaintiff appeals from that judgment.

Costs were taxed in favor of defendants (A. 773, Op.), but the court denied defendants' motion to tax reasonable attorneys' fees as part of the costs recoverable by defendants. (A. 828, Endorsement Order, dated January 25, 1977). Defendants appeal from the order denying them reasonable attorneys' fees.

* "Op." refers to the Order and Opinion of the court below, dated December 22, 1976, reproduced at A. 772-809.

QUESTIONS PRESENTED

On Plaintiff's Appeal of Final Judgment For Defendants:

1. Were the findings of the trial court that defendants did not churn plaintiff's securities accounts and had not committed common law fraud clearly erroneous?

2. Did the court below abuse its discretion under Rule 403 of the Federal Rules of Evidence and the inherent supervisory powers of trial courts in limiting cross-examination on a collateral issue, and was any "error" harmless?

3. Did the court below correctly dismiss the fifth count with respect to technical violations of stock exchange rules where plaintiff did not allege and at trial did not prove either fraud in connection with such violations or a causal connection between the alleged violations and the damage claimed?

On Defendants' Appeal of Denial of Reasonable Attorneys' Fees:

4. Did the trial court err in refusing to award reasonable attorneys' fees as part of the costs recoverable by defendants?

PROCEEDINGS AND FINDINGS BELOW

The Churning Claim

Plaintiff charged that in the period February 11, 1969 through March 31, 1970, deGive, after fifteen years of having produced "substantial growth in plaintiff's account and significant profits in many years," (A. 780, Op.), began to "churn" her securities accounts; that is, entered into transactions unsuitable and excessive for plaintiff for the purpose of generating commissions for himself, in violation of section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.* The court below rejected the claim of churning, holding:

"Plaintiff has failed to prove by a preponderance of the evidence that her account was excessively traded, that the transactions were inconsonant with her investment intent, that any scheme, device or artifice to defraud was employed by the defendants, or that defendants acted with scienter...." A. 805, Op.

Charges of "churning" and "fraud" are factual issues. The trial court set forth its factual findings in a careful and comprehensive analysis. The factual findings of the trial court were compelled by the evidence before it, and the court found:

* The first count of the third amended complaint sought approximately \$600,000 in damages for losses incurred in plaintiff's accounts at Dominick & Dominick and her custodian accounts at The Bank of New York and First National City Bank, over which deGive, but not Dominick, had discretion. The third and fourth counts state separately certain of the transactions pleaded in the first count: the third count alleges churning, but is limited to the purchases and sales in the Dominick account; the fourth count again alleges churning but is limited to the transactions in the custodian securities account maintained by plaintiff at The Bank of New York. (R. 1).

(a) "[T]he transactions executed by deGive were not excessive in light of the plaintiff's intent to 'build up' her account." (A. 801, Op.). The turnover ratio of 2.7 (2.14 annualized) or even 3.0, if plaintiff's figures were adopted, was in itself not excessive and is far below any rate determined to be indicative of churning in any reported case. (A. 800-01, Op.).

(b) The transactions were not inconsistent with plaintiff's investment intent. (A. 807, Op.). Plaintiff's testimony established that plaintiff had acquiesced in and approved similar trading in prior years (A. 801, Op.; see A. 294-95); she had not complained of trades during the complaint period in meetings and telephone conversations with deGive subsequent to the trades (A. 789, 791, 793, 795, Op.; see A. 211-15, 219-20, 242-50, 263-66, 269, 294-95); she had approved in advance at least some of the purchases in October 1969 (A. 788, Op.; see A. 167-68, 255); she had ordered the sale in January 1970 (A. 795, Op.; see A. 264-67); and she had consistently taken large bank loans with which to purchase securities, although she was aware of the risks involved. (A. 782, Op.; see A. 287-88; A. 1029, D. Ex. 245).

Van Alen, "prior to and during the time in question, was a woman of substantial financial position, married to a millionaire and a millionaire in her own right." (A. 774, Op.; see A. 271-77, 1025; D. Exs. 64-67, 75-78, 80, 231). At the beginning of the period of which she complains, plaintiff's

securities accounts alone were worth in excess of \$1,600,000. (A. 787, Op.; see A. 630-631; D. Ex. 239). In addition, with her husband, plaintiff maintained a number of residences, including a shooting preserve, a Fifth Avenue apartment in Manhattan, ten acres of land in Greenvale, Long Island and an estate ("Avalon") overlooking the Atlantic Ocean at Newport, Rhode Island. (A. 777, Op.; see A. 637). deGive was aware that Van Alen and her husband were extraordinarily wealthy and "he took these factors into account in his handling of plaintiff's securities accounts." (A. 777, Op.; see A. 635-640, 956).

(c) In contrast to "the usual case where the broker can offer no explanation or justification for his trading... here the record contains a complete rationale for each investment move made by deGive." (A. 32, Op.). Throughout the period that deGive was plaintiff's broker, deGive followed a "technical system,"* grounded in the basic economic concept of supply and demand as revealed by capital flows into and out of the market. To measure supply and demand, he calculated such factors as "upside" and "downside" volume, numbers

* The technical approach is utilized by a growing number of analysts and has been the subject of many publications. See, e.g., N. Y. Times, "Market Chartists' Influence Growing," April 19, 1976 at 47, col. 8; R. Edwards and J. Magee, Technical Analysis Of Stock Trends (1948); W. Jiler, How Charts Can Help You In The Stock Market (1962); W. Hamilton, The Stock Market Barometer (1922); K. Smilen and K. Safian, Investment Profits Through Market Timing: A Professional Approach (1961).

of issues advancing and declining, and price changes, all over various periods of time. He then plotted these calculations on graphs (or charts) so that visual comparison with comparable measurements at earlier periods could be made.* (A. 777-79, Op.; see A. 313-28, 356-57; P. Exs. 35, 36, 42, 48, 54).

Rejecting what it termed "a valiant attempt by plaintiff's competent trial counsel," the court found "that the evidence in the case just does not substantiate the claim that deGive's indicators constituted a 'paper system' which defendants employed as an 'umbrella' against the charge of churning." (A. 802, Op.). The court found that deGive had followed his system during the complaint period and that during the complaint period deGive did not deviate from the practices he had followed in the prior, profitable and uncomplicated years in which he had handled plaintiff's securities accounts. (A. 785, 802, Op.; see A. 292-93, 384-92, 630-31, 765-71; A. 983, 992, D. Exs. 98(c) and (d)).

(d) Plaintiff "was aware of [deGive's] system and the fact that deGive made major moves and on occasions executed short term transactions....It is clear from all the evidence that plaintiff was willing to accept the benefits of intermediate trading and of deGive's system generally. She must also accept its deficiencies." (A. 801, Op.; see

* deGive's charts were P. Exs. 35 to 59 and D. Exs. 118, 143-156, 161-165, 170-180, 185-193, 198-206, 211, 212-227(c) at trial. Each year deGive maintained six charts on various cycles in the markets as a whole, as well as hundreds of charts on individual issues. Each of these charts represented meticulous attention to the details of the market.

A. 295-99; D. Exs. 64-67). Throughout her 17 year relationship with deGive and Dominick, plaintiff regularly received confirmation slips and monthly statements setting forth all trades executed in plaintiff's accounts. (A. 197-201). At plaintiff's direction, copies of the confirmation slips and monthly statements were sent to plaintiff's attorneys. (A. 202-07). There was regular communication between plaintiff or her assistant and deGive during all those years. (A. 783, Op.; see A. 616-25; A. 948-55; D. Exs. 40, 42-47, 60). Finding that defendants cannot "be held liable for doing in 1969 that which they did in 1966 through 1968 with plaintiff's blessings," the court held that "in this Court's view, this case is an appropriate one for the application of the principle of estoppel". (A. 801, Op.).

(e) The court held that plaintiff "totally failed" to prove scienter. (A. 804, Op.). The court found that deGive acted with a "strong good faith belief" in his technical materials. (A. 803, Op.). deGive's good faith, the court found, was corroborated by the following: (1) in each instance where deGive ordered transactions for plaintiffs he made similar trades at or about the same time for his own wife (A. 780, Op.; see A. 644-67; P. Ex. 63; D. Ex. 98(B)); (2) deGive's market letters published at or about the time he was ordering transactions for plaintiff publicly expressed investment opinions consistent with the action he was taking on

plaintiff's behalf (A. 780, Op.; see D. Ex. 116);* (3) deGive stayed out of the market entirely for long periods of time with plaintiff's accounts invested in Treasury Bills, transactions for which he received no commissions (A. 790, 791, 803, Op.; see A. 655-56); (4) all stocks traded were of a high caliber, listed on the NYSE (A. 781, 804, Op.; see A. 80, Pre-Trial Order, Stip. Fact No. 10); (5) deGive rejected tips on "hot stocks" given him by plaintiff (A. 781, Op.; see A. 288-91); and (6) the amount of commissions received by deGive as a result of transactions in plaintiff's accounts, and commissions received in prior, uncomplained of years, did not provide a motive for deGive to "churn" in light of his income and general financial condition (A. 797-804, Op.; see A. 632-34; D. Exs. 242, 243).

The Charge That Defendants Had
Guaranteed Profits

Plaintiff's common law fraud claim (Count II) alleged that deGive said that he had perfected a system which would insure profits to the plaintiff also failed. The trial court held "that no such representation was made." (A. 806, Op.). The court found that "deGive did not state that the system had been perfected." (A. 793, Op.). Indeed, as the court found, "plaintiff testified that she knew that the market can go up

* Comparison of the transactions in plaintiff's accounts with the analysis deGive published in his market letters and with the transactions made by deGive for his wife is set forth in tabular form in Addendum 1 to this brief.

and down. She stated that deGive never guaranteed that she'd earn profits." (A. 793, Op.; see A. 195).

The NYSE Rules Violation

Plaintiff charged that various violations of Rules 405 and 408 of the NYSE (A. 833, P. Ex. 1) involving failure to initial order slips and the like, was common law fraud in that defendants purportedly represented that they would follow the rules of the NYSE. (A. 48-50, Complaint, Count II). A full trial was held on this issue with judgment for defendants.

The issue of NYSE rule violations had also appeared in a fifth count of the complaint, which Judge Pierce had dismissed prior to trial on motion. The basic allegations of this Count V were that plaintiff and Dominick entered into a customer's agreement which provided in part that "all transactions shall be subject to the rules, regulations, customs and usage of the exchange...where executed...." (A. 51, Complaint, ¶23), and that Dominick's failure to follow these rules subjected it to absolute liability under the laws of contract and agency and Rule 10b-5 promulgated under the Exchange Act of 1934. In 1974, plaintiff moved for summary judgment on Count V.* Defendants cross-moved for summary judgment on Count V. (R. 122, 133).

Plaintiff advanced three theories in support of her

* Plaintiff moved for summary judgment on Count V simultaneously with her motion to amend the complaint so as to add Count V, but the court considered the summary judgment motion to be premature and held it in abeyance until after defendants had answered the Third Amended Complaint (A. 46, Endorsement Order, dated November 19, 1974).

motion for summary judgment on Count V. First, she argued that Dominick was liable for her losses because its alleged technical violations of Rules 405 and 408 rendered it a "disobeying agent." Second, plaintiff argued that Count V stated a cause of action for breach of contract on the theory that in the customer's agreement, Dominick agreed to abide by the regulations of the NYSE, and allegedly it did not do so. Finally, plaintiff argued that the alleged breach of the stock exchange rules in and of itself gave rise to an implied federal cause of action under the Securities Exchange Act of 1934.

The district court denied plaintiff's motion for summary judgment and granted defendants' cross motion to dismiss Count V.* The court ruled that "for a claim to lie for a violation of exchange rules it must be accompanied by charges of fraud" (A. 57, Endorsement Order, dated June 30, 1975), found plaintiff had not pleaded any fraudulent scheme on the part of the defendants in Count V and dismissed the Exchange Act claim. (A. 58, Endorsement Order). The court further ruled that under any of the theories advanced by plaintiff, a causal connection between the alleged violations and the damage claimed had to be shown. Id. Finding that plaintiff had conceded on the motion that she could not prove

* With respect to plaintiff's theory that a violation of NYSE rules in and of itself and without fraud gives rise to an action under the 1934 Act, the lower court treated defendants' motion as one to dismiss for failure to state a claim under Fed R. Civ. P. 12(b)(6); with respect to the "disobeying agent" and breach of contract theories, the defendants' motion was deemed to be one for summary judgment under Fed R. Civ. P. 56 since an affidavit and exhibits had been introduced (A. 56, Endorsement Order, dated June 30, 1975).

any causal connection between this violation of the NYSE rules claimed and the damages alleged, and since the court concluded that there was no such causal connection, the court dismissed Count V in its entirety. (A. 59, Endorsement Order).

Despite the court's dismissal of Count V, the question of whether any deviation from the NYSE rules caused plaintiff's losses was subject to a full trial. The court ruled at trial that its disposition of Count V on motion did not preclude plaintiff from attempting to prove that the alleged rule violations constituted common law fraud which caused her losses (A. 153-56), and plaintiff did, in fact, attempt to prove the causal nexus which she had previously conceded did not exist.

Plaintiff's claim that what the court described as the defendants' "technical violations" (A. 809, Op.) of the NYSE rules caused her market losses fell, however, before the evidence. The court found that the defendants never had "any intent to do anything other than comply with the applicable rules" (A. 806, Op.; see A. 348-49, 675-77, 684-88, 739-42, 749-52). Noting that plaintiff had introduced an expert as the only evidence of causation, the court found "that his testimony turned incredible." (A. 806, Op.). The court found "there to be no credible evidence" that any violation of the NYSE rules "had any causal connection to the alleged losses." (A. 806, Op.). The court held that "plaintiff has failed to establish a causal connection between the technical violations of the NYSE rules and the alleged losses

sustained. Accordingly, the claims based upon violation of the NYSE rules must be dismissed." (A. 809, Op.).

ARGUMENT

POINT I

THE FINDINGS OF THE TRIAL COURT THAT DEFENDANTS WERE NOT GUILTY OF CHURNING WERE COMPELLED BY THE EVIDENCE AND WERE NOT "CLEARLY ERRONEOUS"

To prevail upon her churning claim plaintiff had to show that the defendants excessively traded her account in disregard of her investment objectives and in order to generate commissions for themselves. Greenfeld v. D. H. Blair & Co., [1975-76 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,239 (S.D.N.Y. July 24, 1975); Hecht v. Harris, Upham & Co., 283 F. Supp. 417, 435 (N.D. Cal. 1968), modified on question of damages, 430 F.2d 1202 (9th Cir. 1970); Stevens v. Abbot, Proctor & Paine, 283 F. Supp. 836, 845 (E.D. Va. 1968); see also Booth v. Peavey Company Commodity Services, 430 F.2d 132 (8th Cir. 1970); Johnson v. Arthur Espey, Shearson Hammill & Co., 341 F. Supp. 764, 766 (S.D.N.Y. 1972); Reynolds & Co., 39 S.E.C. 902, 907 (1960). Since a churning claim is based upon Rule 10b-5, to prevail plaintiff had to show that the defendants acted in bad faith and with an intent to defraud. Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).* The court found that plaintiff failed to prove "that her account was excessively traded, that the transactions were inconsonant with

* Plaintiff does not dispute this statement of the law by the court below. (A. 808, Op.).

her investment intent, that any scheme, device or artifice to defraud was employed by the defendants, or that defendants acted with scienter...." (A. 805, Op.).

The findings by the trial court are, of course, not reversible "unless clearly erroneous." Fed. R. Civ. P. 52(a). "Churning" is an intensely factual charge, and this case presented precisely those issues of credibility which are within the province of the trial court to resolve. E.g., International Rys. of Central America v. United Brands, 532 F.2d 231, 241 (2d Cir. 1976), cert. denied, ___ U.S. ___, 45 U.S.L.W. 3251 (1976).

Plaintiff appears to recognize this rule and it is significant that plaintiff does not argue to this Court that the trial court's basic findings -- that the transactions were not excessive, were not inconsistent with plaintiff's investment intent, and were not made in bad faith by deGive -- are "clearly erroneous." Plaintiff resorts to asserting that some of the court's subsidiary findings were wrong. Plaintiff's assault on the trial court's findings is without merit.

A. The Evidence Established That deGive Consistently Followed His System

Plaintiff's principal attack on the conclusions of the court below is to challenge the court's findings regarding deGive's technical system. The sole witness on deGive's technical system was deGive, who was called as an adverse witness by plaintiff. deGive underwent almost three full days of

cross-examination by experienced trial counsel. The great part of deGive's testimony concerned his technical system and the reasons for his investment decisions. The trial judge had the opportunity throughout to consider deGive's testimony and assess his demeanor. Reviewing the evidence, the court specifically held that:

"[H]aving reviewed the exhibits and heard the testimony of the defendant deGive and assessed his demeanor, the Court finds that deGive had a strong good faith belief in the efficacy of his technical material." A. 780, 781, Op.

Plaintiff nevertheless proceeds to argue here, as she argued below, that "no system existed". (P. Brief at 40-48).^{*} The necessary -- but absurd -- implication of this argument is that deGive devoted twenty years of his life^{**} to making detailed measurements of market activity, to plotting those measurements on hundreds of voluminous charts, to reporting publicly his conclusions in his weekly market letter, all so that at some unknown time in the distant future he could use this supposedly non-existent system as an "umbrella" (P. Brief at 47) to protect him from a churning claim. The court below specifically considered and rejected plaintiff's "umbrella" argument. (A. 802, Op.). The so-called "proofs" offered here by plaintiff to support her contention must similarly be rejected.

^{*} "P. Brief" refers to the Brief for Plaintiff-Appellant-Appellee herein.

^{**} deGive began to develop his system several years prior to meeting the plaintiff in 1953. (A. 356-57).

1. deGive's Testimony With Respect To The Number Of "Indicators" Found On His Technical Charts Is Consistent And Supports The Conclusion That He Did, In Fact, Utilize A Technical System

Plaintiff's "first evidence that no system existed" (P. Brief at 42-45) is a counting problem. deGive's testimony on the number of indicators* was consistent.

At pages 43-44 of her brief, plaintiff totals the number of "buying indicators" and "selling indicators" which deGive is supposed to have testified he utilized in his system and arrives at a figure of thirty-five, based upon Plaintiff's Exhibits 35-41. The total is then contrasted with deGive's statement that he had ten indicators for the market as a whole (A. 454), and an apparent inconsistency arises. What plaintiff has done is to count some indicators twice and to omit deGive's testimony that the indicators on Plaintiff's Exhibits 38, 39, 40 and 41 were not used by deGive to generate buy or sell signals, which is what plaintiff purports to be totalling up in her brief.

As deGive testified with respect to Plaintiff's Exhibit 38:

"A. Those indicators are used only after I have received a buy signal in the other charts and am looking for the types of stocks and the emphasis in terms of purchasing. After I have received the buy signal." A. 480 (emphasis added).

* The term "indicator" is used to describe the lines plotted by deGive on his charts as the result of his calculations of market activity.

He subsequently reiterated several times that Plaintiff's Exhibits 38 through 41 did not constitute indicators from which he received his buy and sell signals. (A. 483-86). Therefore the indicators plotted on Plaintiff's Exhibits 38, 39, 40 and 41 should not be included in the "total" of indicators from which deGive purportedly derived his buy and sell signals.

Having eliminated Plaintiff's Exhibits 38-41 from the "total" of thirty-five indicators put forward by plaintiff, the indicators on Plaintiff's Exhibits 35, 36 and 37 are left as constituting the indicators from which deGive derived his buy and sell signals. As plaintiff counts them, these indicators total twenty indicators, ten of which are treated as separate buy indicators and ten as separate sell indicators. (P. Brief at 42). It is apparent, however, that when deGive testified that there were ten indicators "for buying and selling" (A. 454, emphasis added), he meant that each of ten indicators was utilized both as a buying indicator and as a selling indicator. If these indicators are therefore each counted twice, as they are by plaintiff, it is obvious that they total twenty indicators. This is made clear by deGive's testimony at A. 456 and A. 520. The supposed "inconsistency" is a simple problem of counting.

The same counting problem exists with respect to plaintiff's assertion of a discrepancy between deGive's deposition testimony that there were eight indicators on Plaintiff's Exhibit 35 and his trial testimony that there were ten such

indicators.* At the deposition, deGive apparently inadvertently identified the 7 and 10 day moving averages as one indicator, the "daily issues traded," which is understandable since they are plotted along the same axis. (P. Ex. 35). Due to the fact that each graph line is both a buying and a selling indicator, the dropping of one graph line meant the loss of two indicators.

Of course these types of considerations are peculiarly within the province of the trial court. As deGive was testifying the court examined the exhibits and was able to observe and follow the actual indicators referred to by deGive. This contemporaneous visual observation gave the trial court the best opportunity for determining whether "inconsistencies" existed, and implicit in the trial court's findings is a determination that no such inconsistencies did exist. In this connection, it should be noted that contrary to the implication in plaintiff's brief (p. 45), it does not appear that the court below did not have notes on this area of inquiry. In fact, in the midst of the examination into the number of indicators on deGive's charts and in response to the court's

* Plaintiff's statement (P. Brief at 44) that the deposition testimony by deGive was that there were sixteen indicators on Plaintiff's Exhibit 35, eight buying and eight selling, is a bald misstatement. deGive identified four indicators and then, again obviously counting each indicator as a buy and a sell indicator, testified that there were eight indicators on Plaintiff's Exhibit 35 (referred to at the deposition as Exhibit 17). (A. 518).

request to state what he hoped to prove by such examination, plaintiff's counsel himself stated:

"Now, to do that, I have examined Mr. deGive thus far, and your Honor has taken copious notes and has noticed Mr. deGive,...." A. 492 (emphasis added); see also A. 524.

2. The System Required Only 50% Confirmation But deGive Had More Than 50%

Plaintiff's "second proof that no system existed" (P. Brief at 45) is unfathomable. Plaintiff refers to testimony, given by deGive in response to admittedly hypothetical questions, that in both 1969 and prior years deGive would act for Van Alen if the situation arose in which 50% of the indicators were confirming a buy or sell signal. His testimony continued, however, to the effect that in 1969 and 1970 such a situation in fact did not arise because in each instance where a move was made, more than 50% of the indicators were confirming. In other words, it happened that in 1969 and 1970, each time the technical materials gave a buy or sell indication all or nearly all of the indicators were giving confirmatory signals. (A. 533). Thus, there is no "inconsistency" in deGive's testimony. There is simply a divergence between the hypothetical posed by plaintiff's counsel and the actual events.

3. deGive's Use Of The System Was Consistent With Prior Years

Plaintiff's "third proof that no system existed" (P. Brief at 47), is a misnomer, for plaintiff admits in

arguing in support of that "proof" that deGive did have a system for making his purchases and sales, but the claim now is that "[h]e did not operate the system in 1969 the way he had in prior years." (Id. at 48). However, the incomplete and misleading table of stock purchases which is set forth at page 47 of plaintiff's brief will not withstand scrutiny, for deGive did make large scale purchases and sales, or "major moves," for plaintiff's accounts throughout the years. The significant fact is that the nature and pattern of trading in prior years was the same as in the February 1969-March 1970 time period, that is, it consisted of large scale moves over short periods of time as deGive attempted to anticipate market movements on the basis of his reading of his technical materials.

Throughout most of 1967, deGive was, as plaintiff indicates, purchasing only a few stocks at a time. The reason for this is that he had virtually fully invested the plaintiff's accounts in a major purchase move during an eleven-day period in November 1966, a year which plaintiff has not included in her table. (A. 968-69). deGive purchased approximately \$1,190,000 worth of stocks in that eleven-day period, which by any definition is a "major" move. (A. 389).

Similarly, in the month of September 1965 -- also omitted from plaintiff's table -- deGive made purchases for Van Alen totalling approximately 24,000 shares and \$1,027,999.

(A. 389). In addition, in approximately a week's time in March 1964 (when the accounts were considerably smaller) deGive made purchases for plaintiff totalling in excess of \$520,000. (A. 959-60). No figures are available for The Bank of New York in 1963, but within the space of a little over a week in October of that year in the Dominick account alone deGive made purchases for plaintiff totalling over \$170,000. (A. 996-97).

The fact that plaintiff has omitted sales from the table is further misleading, for in October of 1967 deGive sold over \$2,000,000 worth of securities in a ten-day period. (A. 971-72). Having sold out entirely in October 1967, deGive went back into the market with large scale purchases in April 1968 amounting to almost \$1,600,000. (A. 974-75). All of these securities were sold in a major move in October of that same year. (A. 975-76). A few months later in February, 1969, deGive made the first major purchase move which was subsequently included in the plaintiff's complaint herein.

Thus, the evidence introduced at trial compelled the trial court's conclusion that, in response to deGive's analysis of his technical materials, it had been deGive's uniform practice, both in prior years and in the fourteen months covered by the complaint, to make large scale purchases and sales in plaintiff's accounts.

4. deGive Invested His Wife's Money,
Not Having Any Of His Own

Plaintiff's "fourth proof" would condemn deGive for not being as rich as plaintiff. She argues that "[i]t is inconceivable that if he [deGive] in good faith believed that he had a system which with reasonable certainty would forecast the market trends, he would not use it for his own benefit." (P. Brief at 48). First, deGive never said his system could forecast with "reasonable certainty." He testified that it, like all technical systems, seeks to anticipate probable market movements. He believed it was useful in doing that but never contended it could do so with certainty. (A. 311, 357). deGive testified that he did have a small personal account for several years on which he had made some profit, but that he had little or nothing to invest in the years of the complaint (Tr. at 401-04), which is not surprising since he was completing putting five children through college and had no private fortune of his own. (A. 633-34).

Finally, deGive did the next best thing to investing his own money -- he invested his own wife's securities in accordance with his technical system. He did so in a manner consistent with the trading he carried on for Van Alen. (A. 780, Op.; see A. 644-48).*

* See Addendum 1, infra, comparing transactions in plaintiff's accounts, Mrs. deGive's account and deGive's market letter recommendations.

B. The Trial Court Correctly Found That The Public Dissemination Of deGive's Analysis In His Market Letters And The Trading Done By deGive For His Wife Corroborated deGive's Good Faith

1. deGive's Market Letters

In response to the corroboration of deGive's good faith provided by his market letters throughout the 1969-70 period, plaintiff argues that two of the letters do not precisely and expressly advise investors to do what deGive was doing for Van Alen and his own wife. The fact is, however, that a fair reading of each letter indicates that the trading carried on by deGive was consistent with the views expressed in his market letters, and this corroborates his good faith.

First, plaintiff quotes selectively from the May 26, 1969 letter (P. Ex. 10). The full text states:

"The advance which began around the middle of April has failed to produce the normal buying surges and market breadth is negative. The various technical indicators are signalling caution. Investors should now adopt a policy of eliminating weak holdings." A. 851.

As is apparent, the tone of the full letter is far more negative than plaintiff's excerpt. Since most investors do not make "major moves" in their purchases and sales as deGive did, there is no inconsistency, as plaintiff suggests, between deGive's recommending to other investors that they eliminate weak holdings while selling all of the plaintiff's securities on the basis of the negative market conditions reflected in

the letter. That was the way deGive applied his system (A. 779-80, Op.) and that was what he did with plaintiff's accounts and his wife's accounts in May 1969.

The trial court specifically found that deGive adopted this prudent course on behalf of plaintiff and that subsequent events bore out his actions: in less than six weeks the Dow Jones Industrial Average fell from the 930's to 801 while plaintiff's money was safely invested in Treasury Bills. (A. 791, Op.). Far from impugning deGive's good faith, his actions in May of 1969 support the court's conclusion that he was acting in accordance with his reading of market conditions as reflected in his public statements.

Plaintiff's attack on the other market letter, dated November 10, 1969 (A. 1018, D. Ex. 116) is a word game. Since the letter recommends that "new buying should be deferred for the present," plaintiff questions why deGive thereafter sold a relatively small portion of plaintiff's holdings at a profit. The answer to plaintiff's supposed "inconsistency" is contained in the testimony selectively quoted by plaintiff (P. Brief at 50-51) which showed that: deGive's materials indicated the market to be at the end of a short-term up trend; therefore, he believed it was an opportune moment to sell a portion of plaintiff's holdings for gains to take advantage of some prior short-term losses; over the long term, however, he expected the market to continue to advance.

(A. 549-55). deGive testified that he was keeping plaintiff invested in the stock market, but he was acting to recoup some earlier losses and to utilize the tax deduction made available by the earlier losses. (A. 554). There is certainly nothing sinister about this, and it strengthens deGive's claim and the court's finding that throughout the period covered by the complaint deGive was acting on plaintiff's behalf in accordance with his technical system.

2. The Trading By deGive For His Wife's Account

The arguments advanced below and here by plaintiff miss the significance of the similarity in trading. If when deGive traded for plaintiff he also traded for his own wife, this indicates that the trading for plaintiff was motivated by deGive's belief as to the likely direction of the market -- not by fraudulent self-interest. The evidence establishes that in each instance when deGive purchased or sold for plaintiff, he ordered identical transactions for his wife at or about the same time. (A. 644-48; see Addendum 1, infra). Plaintiff argues only that on two occasions when deGive traded for his wife, he did not trade for plaintiff. It is the ultimate irony in this case that plaintiff, who pleaded that deGive traded for her too frequently, now appears to argue that he did not trade enough. Defendants concede that deGive acted slightly more conservatively for plaintiff

than he did for his wife,* but that fact hardly aids a churning claim against him.**

C. Other Claimed Errors Of Findings Are
Either Not Errors Or Are Questions
Of Credibility Properly Resolved By
The Trial Court

The remaining "erroneous findings of fact" which plaintiff asserts the trial court made (P. Brief at 53-58) can be dealt with briefly.

1. Plaintiff in her brief claims that the court erroneously credited deGive's version of certain meetings over plaintiff's versions (though without indicating just what conversations she is referring to).*** In asking this Court to make an assessment of deGive's credibility contrary to that made by the trial judge, plaintiff lists seven items, none of which has anything to do with the conversations deGive supposedly was untruthful about.

Items 1 through 6 are examples of the semantic

* See Defendants' Exhibit 98(A) and Plaintiff's Exhibit 63, which show, for example, that when deGive put plaintiff's funds into Treasury Bills he bought gold stocks for his wife and that while on occasion he purchased speculative puts and calls for his wife, he did not do so for plaintiff.

** The claim that these factors were "overlooked" by the court below (P. Brief at 52) is not true. Counsel for plaintiff raised these points (Tr. 907-11) and they were addressed in Defendants' Memorandum of Law filed in support of their motion pursuant to F.R.C.P. 41(b). (R. 12).

*** In fact we are unable to discern any finding of material significance which turned on a decision as to whom to believe with respect to the occurrences at any particular meeting.

gymnastics engaged in by plaintiff's counsel both on deposition and at trial. What plaintiff attempted to do was to "catch" deGive with labels such as "trader," "agile trader," "investor" and the like. At trial deGive refused to be pulled into the trap. His testimony is consistent that he did not apply a convenient label to plaintiff and then handle her account accordingly. He acted in her best interests by the exercise of his judgment as to what course of action was suited to plaintiff's investment capabilities and desires. Thus, when asked if plaintiff was a "trader," deGive replied:

"A. I did not consider Mrs. Van Alen in that light, whether she was a trader or not a trader. I considered when I made decisions for Mrs. Van Alen, on the basis of my technical analysis I made decisions on my judgment that I thought were in her best interest." A. 358.

When he was asked if plaintiff was a "short-term trader," deGive stated:

"A. I did not characterize Mrs. Van Alen as a long-term holder or as a short-term holder or as a trader." A. 418.

deGive stated how he perceived plaintiff's accounts:

"A. I considered Mrs. Van Alen's investments, to hold them when conditions were favorable and to sell them when, in my judgment, conditions were turning unfavorable." A. 360.

deGive was subjected to three days of cross-examination. The trial court, after closely following that testimony and assessing deGive's demeanor found him to be credible. As plaintiff has stated, "Judge Pierce chose to believe deGive over plaintiff." (P. Brief at 53). This was the trial

court's prerogative and it is here supported by the facts.

2. At page 55 of her brief, plaintiff challenges the court's statement that, "[s]he never complained about the short-term trading in 1968 which resulted in substantial profits." (A. 798, Op.). As is apparent from a reading of the section of the opinion where that statement appears, what the court was dealing with there was plaintiff's claim that in the complaint period "short term" trading was somehow unsuitable for her. But as the court correctly noted, short term trading also took place over the years prior to the period complained of. Plaintiff knew that this trading could and did result in both profits and losses. (A. 294-95). She not only failed to complain about this short term trading, she actually approved it:

"She never instructed deGive not to engage in short-term trading....Indeed in her deposition, Mrs. Van Alen testified that she had no objection to short term trading if it turned out well." A. 798, Op.

It is true that in 1968 there were short-term losses rather than profits. The court was demonstrably aware of that fact because it expressly set forth those losses in its opinion. (A. 785, Op.). Thus, either the word "1968" or the word "profits" in the statement quoted by plaintiff from the court's opinion is apparently a typographical error. In 1967 there were short term profits. (A. 785, Op.; see A. 294-95). Plaintiff did not complain about these. In 1968 there were short term losses. She did not complain about these either.

Either way the significant principle enunciated by the court was correct: the plaintiff knew that short term trading took place in her accounts, she knew that it resulted in both profits and losses, and she never complained about it.

3. Next plaintiff misquotes the court below and then proceeds to strike down her own misquote. The court did not find "evidence of 'considerable correspondence' between plaintiff and deGive indicating her awareness of activity in her account." (P. Brief at 56). It found that in the period 1962 through 1969, "there was considerable correspondence between The Bank of New York, deGive and Ms. Watson, plaintiff's secretary." (A. 783, Op., emphasis added). This is true. (See D. Exs. 42, 60). As for plaintiff, the court found: "In some instances over the years there was written correspondence between the plaintiff and deGive which indicated an interest by the plaintiff in her various financial undertakings." (A. 783, Op., emphasis added). This also is true. (See D. Exs. 36-40, 44-45). Again, the significant determination here is the court's conclusion that "plaintiff, either directly or through her employee Ms. Watson, was keeping watch over her accounts and over the related loans." (A. 783, Op.; see also D. Exs. 46-47, 84). This is corroborated not only by the correspondence mentioned above but by the fact that both prior to and during the complaint period the plaintiff had meetings and conversations with deGive about her accounts.

In 1969 alone plaintiff and deGive met at least three times and had a number of telephone conversations. (A. 789, 791, 793, 795, Op.).

Van Alen's argument that the court made conflicting findings of fact on the question of the knowledge of Dominick's officers as to compliance with the NYSE rules is not correct. The evidence at trial indicated that while the plaintiff's account at Dominick did receive supervisory reviews (A. 675-77, 684-88, 739-42, 749-52), certain technical requirements such as initialling ticket slips were not complied with. The court held that these technical violations did not cause plaintiff's losses, which alone disposes of her claim. In addition, the court dealt with the element of intent requisite to any fraud claim. It held first that at the time the "representation" of compliance with the rules was made "the defendants did not...have any intent to do anything other than comply with the applicable rules." (A. 806, Op.). There was no evidence to the contrary. The court also found that despite the fact that there were technical departures from the NYSE rules with respect to deGive, one of Dominick's many registered representatives, the officers of Dominick who were charged with supervision, honestly believed that they were in compliance with the rules:

"[O]fficers of Dominick who testified stated, and the Court finds the testimony credible, that they believed that during the time in question the firm was operating within the guidelines set forth in the rules, specifically Rules 405, 408 and 342." A. 786, Op.

This finding of good faith was not inconsistent with the existence of technical violations in connection with a single registered representative.

5. The plaintiff argues that because deGive's commissions from plaintiff's accounts was between 15% and 20%, "the logical conclusion would have to be that the income deGive earned from plaintiff's account was important to him and that he might in fact knowingly commit some fraud for that sum of money." (P. Brief at 58, emphasis added). Of course, it was the trial court's prerogative to decide whether deGive in fact did commit fraud and it held he did not. The court correctly noted that the 15-20% figure is below that found in other cases where the amount warranted the inference of scienter. See, e.g., Hecht v. Harris, Upham & Co., 283 F. Supp. 417, 436 (N.D. Cal. 1968) (59% of the broker's commissions). But even more importantly, deGive managed plaintiff's accounts for 17 years. In years prior to 1969 he regularly made substantial commissions on plaintiff's accounts which is natural given their size. In fact in 1968, a year in which no churning is alleged, deGive's commissions amounted to only \$4,000 less than they did in 1969. (A. 632-33). Judge Pierce held:

"The Court cannot find that he suddenly switched to churning in order to reap a mere \$4,000 increase in commissions for that year."
A. 804, Op.

POINT II

THE COURT BELOW CORRECTLY RULED THAT "ALL
DIARY ENTRIES WHICH CAME TO THE ATTENTION
OF THE ATTORNEY FOR THE PLAINTIFF AT A TIME
WHEN AN INQUIRY WAS UNDERWAY WHICH THE COURT
REASONABLY CONCLUDES LED TO THE FILING OF
THE LAWSUIT AGAINST MR. deGIVE MAY NOT BE
USED FOR THE TRIAL FOR ANY PURPOSE"

Approximately one hour from the end of plaintiff's examination of deGive as an adverse witness, which had consumed three days of testimony, plaintiff's counsel began to question deGive with respect to certain "diary entries" made by deGive. deGive testified that the diary entries were not contemporaneous records. (A. 573). The next question established that plaintiff's counsel intended to cross-examine deGive on the basis that deGive had prior to the litigation told Jerome Kamerman, plaintiff's counsel of record and a participant in the trial, that the diary entries were contemporaneous entries. Id. Defendants objected, the witness was excused and the court heard argument. (A. 573-90). Plaintiff's counsel made an offer of proof to the effect that deGive had told Kamerman that the diaries were contemporaneous records. (A. 577-80, 584-87). Plaintiff's counsel conceded that deGive had been cross-examined on these diaries on deposition, that deGive had testified that they were not contemporaneous records and had never stated that he had told Kamerman that they were contemporaneous records, and would adhere to his deposition testimony at trial. (A. 579). The

court sustained defendants' objection, relying on Fed. R. Evid. 403 (A. 589-90), but allowed plaintiff to submit an opposing memorandum. The next day, after receipt of the memorandum from plaintiff's counsel and an affidavit from Kamerman, the trial court reaffirmed its earlier ruling, basing its decision on Fed. R. Evid. 403 and the "exercise of the supervisory obligations imposed upon the Court...."* (A. 672-73).

A. The Evidentiary Ruling Was Properly Made
By The Trial Court As An Exercise Of Its
Inherent Supervisory Powers

In June 1971, Jerome Kamerman, a member of the law firm of Kamerman & Kamerman, plaintiff's counsel of record, a participant in the trial and a partner of the accounting firm of the same name, met with deGive in his offices at 500 Fifth Avenue which housed both the law firm and the accounting firm. The only written communication which either Kamerman firm had prior to that time with deGive was a letter written to deGive on the letterhead of Kamerman & Kamerman, "Certified Public Accountants," which requested deGive to provide the firm with certain information concerning plaintiff's accounts. (A. 1040, Court Ex. 2). At trial, plaintiff submitted an affidavit from Kamerman (A. 1043) which sought to explain away this letter in the same manner adopted in her brief on appeal. (P. Brief at 10-12). Nowhere in the affidavit did Kamerman contest that:

* By this time deGive had also testified on plaintiff's re-direct that he had not used these diaries to refresh his recollection. (Tr. 923-25).

(1) at no time prior to or during the meeting did Kamerman inform deGive that he was an attorney acting for plaintiff; (2) at no time did Kamerman tell deGive that his questioning of deGive was preparatory to bringing this lawsuit against him and Dominick; (3) at no time did Kamerman advise deGive that he might wish to consult counsel; (4) deGive was not accompanied by counsel at the meeting; and (5) Kamerman questioned deGive about the matters which shortly thereafter became the subject of the suit.

While plaintiff sought below as she does here to explain away the connection between the March letter and the June meeting, nothing said negates the trial court's observation that the "...diary entries...came to the attention of the attorney for the plaintiff at a time when an inquiry was underway which the Court reasonably concludes led to the filing of the lawsuit against Mr. deGive...." (A. 585, Op.).

The interest which the district courts have in supervising the standards of practitioners who come before them and the inherent power residing in those courts to maintain the highest standards is long established. Ex parte Burr, 9 Wheat. (22 U.S.) 529, 6 L.Ed. 152 (1824); Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975). The exercise of that power lies within the discretion of the lower court and should not be disturbed unless "flagrantly improper." Ex parte Burr, supra at 530; accord, Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975). Kamerman's conduct

violates established construction of the ethical obligations of attorneys imposed by Disciplinary Rule DR 7-104 of the Code of Professional Responsibility, and former Canon 9 of the Canons of Professional Ethics.*

Kamerman's failure to tell deGive that he was a lawyer seeking information as part of his representation of a party with interests adverse to deGive's directly contravenes Informal Opinion No. 908 by the ABA Committee on Professional Ethics, which interpreted Canon 9.** Informal Opinion No. 908, particularly apposite to the present situation, is concerned with an attorney interviewing and taking a statement from an adverse party whom he may reasonably expect will retain counsel but is not yet represented. That opinion states that when an attorney for a potential plaintiff interviews the potential defendant, there is no breach of ethical standards but, only:

* DR 7-104 and former Canon 9 are reproduced in Addenda 2 and 3 to this brief. While the Code of Professional Responsibility (adopted by the N. Y. State Bar Association effective January 1, 1970) has not been specifically adopted by the Southern District, courts have traditionally looked to the American Bar Association Canons as a guide to the ethical standards expected of attorneys. General Motors Corp. v. City of New York, 501 F.2d 639, 648 (2d Cir. 1974); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973); Theatres Inc. v. Columbia Pictures Indus., Inc., 345 F. Supp. 93, 95 n.1 (S.D.N.Y. 1972); E. F. Hutton & Co. v. Brown, 305 F. Supp. 371, 377 n.7 (S.D. Tex. 1969); see also General Rules of United States District Court for the Southern District of New York, Rules 3(a) and 5(f).

** See ABA Committee on Professional Ethics, Informal Opinion No. 1140 (Jan. 20, 1970) (Addendum 4, infra) holding that DR 7-104, carries forward the meaning and intent of former Canon 9 and that, therefore, opinions rendered on the previous provision are equally applicable under the Code of Professional Responsibility.

"if the attorney advises the potential defendant witness that he is conducting the interview and attempting to take the statement in his position as attorney for the claimant." ABA Committee on Professional Ethics, Informal Opinion No. 908 (Feb. 24, 1966) (emphasis added; see Addendum 5, infra).

Similarly, ABA Committee on Professional Ethics, Formal Opinion No. 117 (Aug. 27, 1934) (see Addendum 6, infra) found no impropriety in an attorney's questioning employees of the person against whom his client has a claim provided no deception is practiced in obtaining their statements and they are informed that the person interrogating them is an attorney and whom he represents.

Also pertinent is ABA Committee on Professional Ethics, Formal Opinion No. 58 (Dec. 14, 1931) (see Addendum 7, infra). The ethics committee there stated that a divorce attorney who meets with the unrepresented spouse prior to commencement of the action for divorce should restrict his discussion to a statement of the proposed action and advice to consult counsel. He may not discuss the facts which furnish or might furnish grounds for the divorce.

Plaintiff's response to the undisputed facts is to argue that Kamerman had some time prior to meeting deGive informed Dominick of his true role. (A. 1043, Court Ex. 4, Kamerman affidavit). Kamerman, however, had an obligation to inform deGive of his representation of plaintiff and his failure to do so is a violation of ethical standards regardless of deGive's supposed knowledge. The violation is not excused because deGive might have learned the facts from another

source.* The possibility that a potential defendant might be aware of an adverse attorney's true role because of conversations the attorney had with his employer months prior to the date of the interview is no substitute for the direct warning contemplated by the ethical opinions discussed above.

Moreover, if deGive and Dominick were treated as one and the same, as plaintiff suggests by justifying Kamerman's actions on the ground that he had informed Dominick of his true role, then Kamerman's conduct violated DR 7-104(A)(1) of the Code of Professional Responsibility (see Addendum 2) which provides that during the course of his representation of a client, a lawyer shall not:

"(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

Kamerman should not reasonably have believed that an investment banking and brokerage firm such as Dominick did not have counsel to represent it in all matters and that this counsel was available to deGive. (A. 574).

Finally, even an appearance of impropriety requires prompt remedial action by the court, Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 565 (2d Cir. 1973). And such action will be taken even where the conduct is not precisely covered by a particular Canon or section of the Code.

* There was no showing, or offer to make such a showing, that deGive had in fact learned that Kamerman was an attorney for plaintiff conducting a pre-lawsuit investigation.

Handleman v. Weiss, 368 F. Supp. 258, 263 (S.D.N.Y. 1973). The conduct of Kamerman here, even if it were not violative of a "bright line," is an impropriety of the type which should be remedied within the sound discretion of the trial judge.

Plaintiff's argument that even if counsel was guilty of misconduct the evidence concerning the diary sheets should nevertheless have been admitted (P. Brief at 13) is based on cases which hold, in effect, that "the exclusionary rule" applicable to illegal search and seizure in criminal cases does not extend to civil cases. Even if that is true,* it is irrelevant, for we are not here dealing with the general question of the applicability of the Fourth Amendment exclusionary rule to civil cases but with the issue of whether the trial court's refusal to admit the diaries was a sound exercise of its discretion in supervising the Bar. The facts show that it was.

The sanction here adopted was tailored to fit the particular violation. There was no drastic remedy such as a

* Sackler v. Sackler, 16 App. Div.2d 423, 229 N.Y.S.2d 61 (2d Dep't 1963) (P. Brief at 13) holds that the Fourth Amendment protects against governmental intrusion and cannot apply to private persons, and that the rationale of the exclusionary rule has no justification in civil cases: neither point is here applicable. In any event, the rule on excluding illegally obtained evidence is not as black-letter as plaintiff suggests. For cases excluding illegally or improperly obtained evidence in civil cases, see One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); Lebel v. Swincicki, 354 Mich. 427, 93 N.W.2d 281 (1958); Irizarry v. City of New York, 357 N.Y.S.2d 756 (Civ. Ct. N.Y. Cty. 1974); and generally Reyes v. Rosetti, 262 N.Y.S.2d 845 (Civ. Ct. Bronx Cty. 1965).

disqualification of plaintiff's counsel. Nor was plaintiff prevented from introducing any evidence directly pertinent to the transactions at issue. The court simply refused to admit evidence of material obtained in the course of the very conversation which constituted a violation of standards of professional conduct. Precisely the same type of sanction was imposed in Obser v. Adelson, 96 N.Y.S.2d 817, 818 (Sup. Ct. N.Y.Cty. 1949), aff'd without opinion, 276 App. Div. 999, 95 N.Y.S.2d 757 (1st Dep't 1950). There, because the defendant's attorney had taken a statement from the mother of an infant plaintiff in violation of the rule prohibiting contact with an opposing party, the court granted the plaintiff's motion to preclude the defendants from using the statement "for any purpose whatever." 96 N.Y.S.2d at 818. Here the sanction was even less burdensome. The court did not refuse to admit a statement directly concerning the transaction at issue. Rather it excluded evidence of a collateral matter -- the claim that deGive "lied" to Kamerman (during the violative conversation) which "lie" was to be used for the purpose of impeaching deGive. Under all the circumstances, the court acted within its sound discretion in excluding the evidence.

B. The Evidence Relating To "Diary Entries"
Was Also Excludable Under Rule 403 Of
The Federal Rules Of Evidence

The trial court also based its ruling excluding the evidence relating to the diaries on its discretionary powers

under Rule 403 of the Federal Rules of Evidence. Rule 403 provides:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The trial court, in refusing to admit the diary-related evidence, stated:

"...Given what has been presented from the floor by way of oral proffer, by way of written response, presented with this in its total context of the movement of this trial, and having in mind my obligation in terms of the administration of time in any trial, I simply rule under 403...that the evidence may not be presented insofar as it was obtained in the fashion which has been represented here by counsel, and particularly Mr. Barist, but giving consideration to Mr. Shaffer's explanations and representations as well." A. 589-90.

And again, after giving plaintiff a chance to submit a memorandum on the issue:

"The Court is faced with an invitation to have a voir dire to inquire into certain factual matters asserted by plaintiff's counsel, which are different than the factual allegations asserted by the defendants' counsel. This case is already more than two days beyond the anticipated terminal point, we are still on the plaintiff's case, we are struggling to get to the defendants' case. The defendant has indicated a willingness to try to hold his anticipated three days of defense material to three days, despite the increased length of the trial thus far, and if at all possible to conclude this case by the end of this week, early afternoon, Friday. The Court has already had to shift another trial which was scheduled to commence Thursday and continue Friday.

"Given all of this, I adhere to my ruling

announced yesterday afternoon. I adhere to the basis for the ruling as being Rule 403...."* A. 671-73.

This ruling was within the trial court's discretion.

The supposed prior inconsistent statements would not appear simply from deGive's testimony, since all parties recognized that he would testify that he had never misrepresented the calendar sheets to plaintiff's co-counsel. (A. 584). It would then have been necessary for plaintiff to call as a witness her own co-counsel to refute deGive's testimony. Plaintiff could not have called Kamerman to testify on her behalf. J. P. Foley & Co., Inc. v. Vanderbilt, 523 F.2d 1357 (2d Cir. 1975); Disciplinary Rule DR 5-102, Code of Professional Responsibility. At that point, the court would have been faced with a full blown "trial within a trial" on the collateral issue of what was said, and who would be allowed to testify as to what was said, at the meeting between deGive and plaintiff's counsel. This need to consider collateral issues was presented to Judge Pierce (A. 583-84), and was properly considered by the court in making its ruling.

The trial judge may refuse to admit evidence or cross-examination when he believes that it unduly emphasizes collateral issues and might lead to undesirable multiplication of issues. Shaw v. Scoville, 369 F.2d 909, 911 (2d Cir. 1966). Thus, where the defendant offered a prior statement made by

* The court went on to base its ruling on its supervisory power as well, as discussed above.

plaintiff's witness concerning the witness' knowledge of a hazardous condition, the court held that exclusion of the statement, which was claimed to be inconsistent with the witness' testimony at trial, was properly within the discretion of the court since the statement was only remotely connected to the real issue of the plaintiff's knowledge of that condition and its introduction would have necessitated further delay in the trial. Perrone v. Pennsylvania R. Co., 143 F.2d 168, 169-70 (2d Cir. 1944).

It is established that "[i]t is a function, even a duty, of the trial judge to control and check" the frequent tendency of a trial to degenerate into a series of mini-trials of side issues." Howser v. Pearson, 95 F. Supp. 936, 941 (D.D.C. 1951). This Court held in United States v. Pacelli, 521 F.2d 135, 139 (2d Cir. 1975), cert. denied, 424 U.S. 911 (1976), that it was within the discretion of the trial judge to avoid "what, in effect, would have been a separate fact-finding venture" by barring the defendant from examining into the circumstances of a witness' admittedly perjurious testimony at a prior trial which had been introduced to impeach the witness' credibility.

The need to conduct "a trial within a trial" on a collateral issue led this Court to affirm the lower court's exclusion of evidence in United States v. Bowe, 360 F.2d 1 (2d Cir.), cert. denied, 385 U.S. 961 (1966). The defendant there offered a witness to testify that the government agent had suggested the commission of an illegal action to that

witness as proof of the defense of entrapment of the defendant. This Court, finding that the proffered testimony might lead not only to further direct testimony on "whether, by whom and in what context the statements were made," but also to impeachment testimony, held that the confusion and delay which would have resulted outweighed the slight probative value of the testimony. Id. at 16. The trial court in this action was equally justified in excluding the diary-related materials. "Whether, by whom and in what context the statements were made" would similarly be open to proof by the parties. Impeachment evidence might also be brought out. All of this time and energy would have been directed to the proof of an issue with little, if any, direct bearing upon the real questions in this lawsuit. The trial court did not abuse the discretion vested in it by Rule 403 in excluding the diary-related evidence.

C. Even If The Evidentiary Ruling
Was In Error, It Was Harmless
And Does Not Warrant A New Trial

Rule 61 of the Federal Rules of Civil Procedure provides:

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Rule 103 of the Federal Rules of Evidence provides in part:

"(a) Effect of erroneous ruling--Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."

Even if the trial court's ruling on the diary evidence were in error it would be harmless, for it could not, and did not, affect any substantial right of plaintiff.

Plaintiff argues on appeal that the proffered evidence would have had a bearing on the issue of deGive's scienter. But the evidence of deGive's good faith, as discussed at length above, was so weighty that the introduction of this collateral material could not have affected the court's conclusion that deGive did act in good faith. More fundamentally, the diaries at best bore only upon the issue of scienter. The diaries could not have filled the fatal gaps in plaintiff's proof with respect to other essential elements of her claims.

Where a plaintiff fails to adduce evidence in support of necessary elements of its claim, any error in excluding evidence is rendered technical and no cause for reversal since there was no effect on substantial rights of the plaintiff. Newfield v. Oosterhuis, 137 F.2d 437 (2d Cir. 1943) (bookkeeping records, even if improperly excluded at trial, could not rectify plaintiff's failure to prove three necessary elements of his claim). Thus, in Shumate & Co., Inc. v. National Ass'n. of Sec. Deal., Inc., 509 F.2d 147 (5th Cir.),

cert. denied, 423 U.S. 868 (1975), a verdict directed in favor of all defendants on the ground that plaintiff had shown no evidence of injury to the plaintiff arising out of the alleged antitrust conspiracy was upheld despite possible error in excluding from evidence certain SEC staff memoranda. Since proof of injury to the plaintiff in his business or property is a sine qua non for stating a cause of action under 15 U.S.C. §15, the introduction of the disputed evidence would not have saved plaintiff from a directed verdict because it did not bear on the fatally weak point in plaintiff's case. Id. at 152. The court stated that:

"[E]ven if the opinions had been admissible to show the conspiracy, they would not have affected the directed verdict against Shumate which was based upon his failure to produce evidence of any injury." Id. at 156.

To recover for "churning," plaintiff had to prove not only that deGive acted with a "bad motive," but that the trading in her accounts was excessive, a necessary element in any churning claim. Hecht v. Harris, Upham & Co., supra; R. 9, Plaintiff's Omnibus Memorandum at the Close of All Evidence at 3-4 ("However, plaintiff need only show as to counts One, Three and Four that deGive traded with the evil motive of generating commissions rather than making transactions in accordance with plaintiff's investment purpose and that those transactions were excessive."); see also the cases cited at page 13, supra. The court below held -- in a determination which was independent of anything having to do with

deGive's credibility -- that the trading in plaintiff's accounts was not excessive. (A. 801, Op.). These findings are fatal to plaintiff's churning claim regardless of deGive's motives.

The same is true with respect to plaintiff's common law fraud claim alleging that deGive had misrepresented to plaintiff that he had perfected a system to insure her profits. The court found that no such representation was made and based its findings on plaintiff's testimony that what deGive had stated was that he had the system "almost all set up". (A. 793, Op.; see Tr. 345-46). This finding is further supported by the testimony of plaintiff that deGive had never made her any guarantees. (A. 793, Op.; see A. 195).

Similarly, the court's finding against plaintiff on her claims relating to alleged violations of the NYSE rules was based on facts independent of deGive's credibility or mental state. The court held that it found credible the testimony of the officers charged with supervising deGive that they believed Dominick to be in compliance with the rules (A. 806, Op.); that plaintiff had not proved reliance on any alleged misrepresentation as to the NYSE rules (A. 786, Op.), and that plaintiff had failed to prove that any rule violation caused her loss (A. 805-06, 809, Op.).

The court, in sum, found that plaintiff had failed to prove any of the necessary elements of her claims. The exclusion of the diary evidence, offered by plaintiff as

going only to deGive's scienter, had no bearing on other essential elements of plaintiff's claims -- elements she failed to prove.

"Its admission under these circumstances would have been highly unlikely to have changed the result. Such error as there was here was harmless error within the purview of 28 U.S.C. §2111 and Rule 61, Fed. R. Civ. P. and is not ground for reversal." United States v. Heyward Robinson Co., 430 F.2d 1077, 1082 (2d Cir. 1976).

Accord, International Air-Indus., Inc. v. American Excelsior Co., 517 F.2d 714, 727 (5th Cir.), reh. en banc denied, 521 F.2d 815 (1975), cert. denied, 424 U.S. 943 (1976); Hallmark Indus. v. Reynolds Metals Co., 489 F.2d 8, 14 (9th Cir. 1973), cert. denied, 417 U.S. 932 (1974).

POINT III

THE COURT BELOW CORRECTLY DISMISSED PLAINTIFF'S CLAIMS RELATING TO THE NYSE RULES

The fifth count of the complaint alleged that plaintiff and Dominick entered into a customer's agreement (D. Ex. 1) which provided in part that "all transactions shall be subject to the rules, regulations, customs and usage of the exchange...where executed" and that defendant Dominick failed to abide by certain requirements of NYSE Rules 405 and 408 with respect to purchases and sales made for plaintiff's securities account at Dominick.* While the fifth count was cast in general terms, it is clear from the proceedings below and

* For a full description of the proceedings below on the fifth count, see pp. 10 to 12, supra.

her brief on appeal that plaintiff claimed that Dominick failed to use "due diligence" and to learn the "essential facts" relative to plaintiff and her account at Dominick (Rule 405(1)) and failed to comply with the requirement of Rule 408 which calls for approval and initialling of each discretionary order by a supervisor on the day entered. (P. Brief at 19-20). The court below found -- as defendants conceded -- that the order tickets for plaintiff's account at Dominick were not initialled on the day entered. The court also found, however, that Dominick's compliance officer and his staff reviewed each day all confirmations of the trades made the preceding day by all Dominick representatives, including deGive, and also reviewed a daily IBM printout which listed all trades made by Dominick, broker by broker. (A. 785-86, Op.; see A. 740-41). In addition, the undisputed evidence at trial showed that there was a review by the compliance director, on a monthly basis, of the monthly statements for each customer's (including plaintiff's) account, which showed all trades in the customer's account during the period. There was also a review of a monthly "recap" of all trading activity conducted by each representative during the month. (Tr. 972-73). Thus, despite any technical defects, the review of a customer's account which is the object of the rules in question did occur with respect to plaintiff's account at Dominick.*

* Similar reviews were conducted with respect to the accounts maintained by the banks at Dominick, through which plaintiff also traded. (A. 786, Op.). Of course, Dominick did not
[footnote continued]

A. The Trial Court Correctly Dismissed
The Allegation Of The Fifth Count That
The Rules Violations Gave Rise To An
Implied Cause Of Action

There is, under the circumstances of this case, no implied cause of action for violation of the exchange rules in question. While defendants recognize that Judge Friendly's dicta in Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir.), cert. denied, 385 U.S. 817 (1966) and several court decisions are to the contrary, recent decisions of the Supreme Court dealing generally with the question of implied causes of action under the federal securities laws teach that a customer does not have an implied right of action against a stock exchange member for violation of an exchange rule. These decisions have held that even where a plaintiff is claiming directly under a provision of the federal securities laws (as opposed to a stock exchange rule) a private action may be implied only where necessary to insure fulfillment of Congress' purposes in adopting those laws. Santa Fe Industries v. Green, ___ U.S. ___, 97 S. Ct. 1292 (1977); Piper v. Chris-Craft Indus., Inc., ___ U.S. ___, 97 S. Ct. 926 (1977).^{*} Customers have their full panoply of common law and statutory remedies against defrauding

[footnote continued from preceding page]
review plaintiff's accounts at the banks (Tr. 1081-82), but there is no requirement that it do so, and in any event those accounts are not at issue because Count V alleges violations only in connection with the account at Dominick.

* See also Cort v. Ash, 422 U.S. 66 (1975).

brokers. There is no necessity to further open the federal courts to disappointed customers by creating an additional remedy directly under exchange rules.

Even if in some cases an implied federal cause of action can exist for violation of certain exchange rules, it does not exist for violations of the type of rules involved here. While there is some authority in this Circuit that a violation of Rule 405 will give rise to an implied federal claim (see Starkman v. Seroussi, 377 F. Supp. 518 (S.D.N.Y. 1974)) the weight of authority -- and we believe the correct authority -- is to the contrary. In Landy v. Federal Deposit Ins. Corp., 486 F.2d 139 (3d Cir. 1973), cert. denied, 416 U.S. 960 (1974), the Third Circuit held that Rule 405 did not meet the Second Circuit standards for liability set forth in Colonial Realty:*

"Plaintiffs have failed in this action to maintain the burden imposed of demonstrating rule 405's 'place in the [federal] regulatory scheme.' There is no indication in the record that the SEC participated in its formulation or was specially interested in its enactment. We find no indication that the SEC or the NYSE consider rule 405 part of the federal scheme to prevent fraudulent practices and protect investors. Indeed, to the contrary, what evidence we have been able to find in our own research points to an opposite conclusion." 486 F.2d at 166-67 (footnote omitted).

Accord, Zagari v. Dean Witter & Co., Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶95,777 (N.D. Cal. Sept. 27, 1976); Lange v. H. Hentz

* Judge Friendly's seminal opinion in the Colonial Realty case, supra, stated that the determination of whether to imply a federal remedy was to be based on "such considerations as the protection intended by the legislature and the ineffectiveness of existing remedies, administrative and judicial, fully to achieve that end." 382 F.2d at 181.

& Co., 418 F. Supp. 1376 (N.D. Tex. 1976); Jenny v. Shearson, Hammill & Co., Inc., [1974-75 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,021 (S.D.N.Y. 1975); Aetna Cas. & Sur. Co. v. Paine, Webber, Jackson & Curtis, [1969-70 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶92,748 (N.D. Ill. Apr. 7, 1970).

While there are apparently no cases dealing specifically with Rule 408, the Colonial Realty test applied to Rule 408 leads to the same conclusion. Rule 408 is not designed to substitute the reviewer's investment judgment for that of the person exercising the discretionary power. Rather, as plaintiff admitted in the memorandum submitted in support of her motion for summary judgment (A. 45), it is designed to prevent trading which is "excessive in size and frequency relative to the financial resources of the customer as applied to discretionary accounts." NYSE M. F. Educational Circular No. 252. (A. 839). In other words, Rule 408 is designed to prevent "churning"* which is a violation of Rule 10b-5, and Rule 408 is thus merely duplicative of federal regulation.

Plaintiff's claims under NYSE Rules 405 and 408 must fall for another reason as well. The court below dismissed the claim for an implied federal cause of action for

* SEC Rule 15c 1-7, 17 CFR §140.15c1-7 specifically defines the term "manipulative, deceptive or other fraudulent device or contrivance," contained in Section 15c(1) of the Securities Exchange Act, 15 U.S.C. §78o(c)1 to include transactions of purchase or sale "which are excessive in size or frequency" in view of an account's financial resources. Although Rule 15c 1-7 applies only to over-the-counter transactions, the courts have looked to that definition in treating churning as fraudulent under Rule 10b-5. (E.g., Lorenz v. Watson, 258 F. Supp. 724 (E.D. Pa. 1966)).

violation of the NYSE rules upon plaintiff's failure to plead allegations of fraud in connection with the alleged violations of Rules 405 and 408 (A. 57-8, Endorsement Order) and ultimately on her failure at trial to prove such fraud. (A. 807-08, Op.). On appeal the plaintiff does not even address that issue; but absent fraud there can be no implied federal claim for violation of a stock exchange rule. See Utah State Univ. v. Bear Stearns & Co., [Current] Fed. Sec. L. Rep. (CCH) ¶95,847 at 91,084 (10th Cir. Jan. 24, 1977); Parsons v. Hornblower & Weeks-Hemphill, Noyes, [1976-77 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,885 at 91,249 (N.D.N.C. Feb. 9, 1977); Carroll v. Bear Stearns & Co., 416 F. Supp. 998, 1062 (S.D.N.Y. 1976); Jenny v. Shearson, Hammill & Co., [1974-75 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,021 at 97,582 (S.D.N.Y. Mar. 11, 1975); Architectural League of New York v. Bartos, 404 F. Supp. 304, 314 (S.D.N.Y. 1975); Rich v. New York Stock Exchange, 379 F. Supp. 1122, 1126 (S.D.N.Y. 1974); Hecht v. Harris Upham & Co., 283 F. Supp. 417, 430 (N.D. Cal. 1968), modified on other grounds, 430 F.2d 1202 (9th Cir. 1970).*

Plaintiff relies most heavily on two Seventh Circuit cases, SEC v. First Securities Co. of Chicago, 463 F.2d 981 (7th Cir.), cert. denied sub nom. McKay v. Hochfelder, 409 U.S. 880 (1972) and Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 410 F.2d 135 (7th Cir. 1969). However, both

* Starkman v. Seroussi, 377 F. Supp. 518 (S.D.N.Y. 1974), relied upon by plaintiff, is not to the contrary for the court there held that a misrepresentation as to compliance with the rules was "an integral part" of a scheme to defraud plaintiff. Id. at 524.

cases involved fraud as an integral part of the alleged violation: in Buttrey the defendant's knowing violation of Rule 405 was "tantamount to fraud," 410 F.2d at 143; and in First Securities, the defendant brokerage firm -- found to have violated NASD Rule 27 -- was in effect the alter ego of its president who had engaged in an intentional fraud, aided and abetted by the firm. 463 F.2d at 988.

The Seventh Circuit has itself very recently held in a case involving the NASD counterpart of NYSE Rule 408 that its prior decisions stand only for the proposition that a violation of exchange rules involving a fraudulent scheme may give rise to a private right of action, and that absent fraud there is no such right. Sanders v. John Nuveen & Co., [Current] Fed. Sec. L. Rep. (CCH) ¶96,030 at 91,616 (7th Cir. Apr. 22, 1977). Here, not only did plaintiff fail to plead fraud in connection with the alleged rule violations, the court below found after a full trial that in fact here there was no fraud -- deGive acted in good faith, and plaintiff's accounts were not churned. Plaintiff's claims based on violations of NYSE rules were properly dismissed.

B. The Court Below Found That There Was No Causal Connection Between The Rules Violation And The Damage Claimed Under Any Of Plaintiff's Theories

Under any of plaintiff's three theories for recovery, plaintiff had to prove that the violations of the NYSE rules caused her losses. It is black letter law that causation is

a required element in any claim brought under the Exchange Act. J. I. Case v. Borak, 377 U.S. 426, 431 (1964); Dopp v. Franklin Nat'l Bank, 461 F.2d 873 (2d Cir. 1972); List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir.), cert. denied sub nom. List v. Lerner, 382 U.S. 811 (1965); Bell v. J. D. Winer & Co., Inc., 392 F. Supp. 646, 651 (S.D.N.Y. 1975). Plaintiff's protestations to the contrary notwithstanding, it was plaintiff's burden to prove causality. Indeed, in Baird v. Franklin, 141 F.2d 238 (2d Cir. 1944) (involving a claim under Section 6 of the 1934 Act against the New York Stock Exchange for failure to fulfill its supervising responsibilities) Judge Augustus Hand held:

"We accede to the view that the Stock Exchange violated a duty when it failed to take disciplinary action....But to justify a judgment in favor of either plaintiff such a breach of duty must have resulted in damage that can be traced to the breach....[The plaintiffs] had the burden of showing that the breach of duty was the cause of their loss." 141 F.2d at 239 (emphasis added).

It is similarly axiomatic that any recovery based on an alleged breach of contract is dependent upon a showing that the breach caused the plaintiff's damage. E.g., 5 Corbin Contracts §992 (1964). The mere showing of a breach without proof that the breach caused plaintiff's loss is insufficient. Great American Ins. Co. v. Bureau Veritas, 478 F.2d 235 (2d Cir. 1973) (one reason for judgment for defendant was that "plaintiffs have failed to meet their burden of proving by a preponderance of the evidence that the alleged breach of warranty or duty was the proximate cause of the sinking");

United States v. Mt. Vernon Milling Co., 345 F.2d 404, 405 (7th Cir. 1965) ("To recover damages plaintiff must show that those damages flow directly and naturally from the breach of contract which defendant here admitted for the purpose of its motion for summary judgment. The breach must have been the cause of the injury.") Accord, Boyajian v. United States, 423 F.2d 1231 (Ct. Cl. 1970); Chamberlain v. Parker, 45 N.Y. 569 (1871); Coppola v. Kraushaar, 102 App. Div. 306, 92 N.Y.S. 436 (2d Dep't 1905); Commercial Credit Corp. v. C. F. Schwartz Motor Co., 251 A.2d 353 (Del. Super. Ct. 1969); Baker v. Riverside Church of God, 61 Tenn. App. 270, 453 S.W.2d 801 (Tenn. App. 1970).

The law of agency is to the same effect. A principal may not recover simply because the agent breached an instruction unrelated to the alleged damage. The principal must also prove that damages resulted from the violation. See Mogul, Inc. v. Lavine, Inc., 247 N.Y. 20, 159 N.E. 708 (1928); Johnson v. New York Central R.R. Co., 33 N.Y. 610 (1865); Hawes v. Birkholz, 114 N.Y.S. 765 (App. Term 1908); Restatement (Second) of Agency, §401 (1958). This required element of a causal connection between any violation and damages under a theory based on breach of duty extends to all actions in agency. Causality must also be established by a principal suing his agent for a breach of an implied warranty of authority, Moore v. Maddock, 251 N.Y. 423, 167 N.E. 573 (1929); or for breach of contract, Minneapolis Trust Co.

v. Mather, 181 N.Y. 205, 73 N.E. 987 (1905); Goldfinger v. Doherty, 153 Misc. 826, 276 N.Y.S. 289 (App. Term 1934), aff'd, 244 App. Div. 779, 280 N.Y.S. 778 (1st Dep't 1935); or for negligence, Downing v. Howard, 162 F.2d 654 (3d Cir. 1947), cert. denied, 332 U.S. 818 (1947).

On the motion for summary judgment below, plaintiff conceded that she could not prove such causal connection between the rules violated and her losses* and the court found there to be none. Summary judgment for defendant was properly granted.

Plaintiff now contends on appeal that she was entitled "to try to prove" a causal relationship between the alleged violations and her losses. The fact is that she was given full opportunity to prove causation at trial. As has been discussed previously (supra at 12-13), despite the dismissal of the fifth count, the court below permitted plaintiff to put in her evidence of rules violations as part of her case on the remaining counts. Plaintiff proceeded to introduce into evidence NYSE Rules 324, 405 and 408, as well as Educational Circular No. 252 (P. Ex. 1), and to examine the former President of Dominick (Rockefeller, Tr. at 936-84),

* Plaintiff now relies on cases dealing with situations where a plaintiff has proved that a breach of duty caused his or her loss but cannot prove the extent of damages. See P. Brief at 30. Those cases are inapposite for here plaintiff has failed to cross the first threshold: she failed to prove that the alleged violations in fact caused her any loss.

the officer in charge of the plaintiff's account at First National City Bank (McMahon, Tr. at 986-93), the head of Dominick's "back office" operations (Neumayer, Tr. at 1093-1109) and, by deposition, Dominick's director of compliance (Mitchell, Tr. at 1166-99), all with respect to defendants' compliance with NYSE rules. Plaintiff attempted to prove causation through the testimony of John J. McDonald, her "expert" witness. (Tr. at 1002-33). The trial court did not find the testimony of plaintiff's expert to be credible:

"Further, the Court finds there to be no credible evidence that any of the alleged misrepresentations had any causal connection to the alleged losses. The only evidence of a causal connection was presented through the testimony of an expert witness, and the Court does not find the testimony credible given the fact of this case. While the witness' credentials were adequate for certification as an expert, the Court must conclude that the hypothetical questions placed to the expert by plaintiff's counsel failed to fully reflect the circumstances of this particular case. The expert did not sit in the Courtroom throughout the presentation of the evidence; the Court finds that his understanding of the circumstances of the case was significantly limited. Further, the witness proved so inflexible on cross-examination that his testimony turned incredible; thus, his testimony to the effect that more careful supervision would have prevented some of the later trading in the account is not given sufficient weight to establish the causation element." A. 806-07, Op. (emphasis added).*

* It is, of course, within the discretion of the trial court to reject testimony, including expert testimony, which it does not find credible, whether or not there is contradictory testimony in the record. E.g., Minnesota Mining and Mfg. Co. v. Berwick Indus., Inc., 532 F.2d 330, 333 (3d Cir. 1976); Eason v. Weaver, 484 F.2d 459, 460 (5th Cir. 1973); United States v. Diapulse Corp. of America, 457 F.2d 25, 30 (2d Cir. 1972).

After reviewing all the evidence the court held:

"...plaintiff has failed to establish a causal connection between the technical violations of the NYSE rules and the losses sustained." A. 809, Op.

Moreover the court properly could reject McDonald's testimony because it was based on his view on the ultimate issue which the court was to determine. McDonald gave as his reason why he would not have permitted certain of the trading which had taken place in plaintiff's account that deGive might be churning the account. (A. 712). Yet the issue of churning was the ultimate issue for the court to decide, and it found there was none -- a finding overwhelmingly supported by the evidence.*

The court's finding as to the lack of causation was also fully supported by considerations independent of McDonald's testimony which the court did not find credible. While there were some technical defects in the procedures, plaintiff's account at Dominick and the trading in it were reviewed by supervisory personnel. (See page 48, supra). As the court below held:

"The evidence including the unanimous testimony, of the officers is that, over a period of years, they had faith in the operation of deGive's system and in deGive's professional reputation in the financial community. As stated by Mitchell, even had he detected major purchases and sales, or

* Of course, a court does not have to accept an "expert's" opinion on the ultimate issue to be determined by the court. Marx & Co. Inc. v. The Diners Club, Inc., Nos. 76-7050, 76-7069 (2d Cir. Feb. 25, 1977).

other purchases and sales by deGive in the Van Alen accounts, he would not have inquired of the broker since he believed that deGive always had valid reasons for his investment decisions." A. 787, Op.

Thus, there is simply no basis for arguing that Dominick's officers would have stopped the trading in plaintiff's accounts had every technical aspect of every rule been fully complied with.

Most importantly, the court's finding on causality is supported by the nature and purpose of the rules involved. Plaintiff now argues that the essence of Rules 405 and 408 is "to have two heads on every account." (P. Brief at 27). No evidence was presented below to support that view, and the evidence established that the rules were not designed to have a supervisor inject his investment judgment in place of deGive's, the person to whom Van Alen had given discretion. Rather, the rules are designed to avoid the type of trading which the court held did not occur here. Rule 405 is the "suitability" rule of the NYSE, designed to implement procedures aimed at avoiding trading which is unsuitable or excessive for the customer involved. (See cases discussed at 50-51, supra). However, the trial court held that the trading in plaintiff's accounts was suitable for her, given her wealth, investment intent, and long acquiescence in, and approval of similar trading. Thus, any deviation from Rule 405 did not cause the evil that the rule was designed to prevent, because the evil did not occur.

Similarly, Rule 408 -- the "initialling rule" -- also is not designed to have "two heads" on an account. Rather, as set forth in NYSE Educational Circular 252 (A. 839; P. Ex. 1), the purpose of Rule 408 is to prevent violations of "the Rule against effecting purchases or sales of securities which are excessive in size or frequency relative to the financial resources of the customer as applied to discretionary accounts." In other words, Rule 408 is designed to prevent churning.* In fact plaintiff's own expert testified that he would have disapproved the trading in question, not because of a contrary judgment as to investment strategy, but because he feared churning. (A. 712). But the court, after hearing all the evidence, found that DeGive was not churning. Thus, it is again clear that any technical violations of Rule 408 did not result in the evil the rule was designed to prevent and the plaintiff's claim must fail for lack of causation. See J. I. Case v. Borak, 377 U.S. 426, 431-33 (1964); Restatement of Torts (Second) §§286, 288 (1965).

C. Plaintiff Is Estopped From Complaining About The Trades In Question

Plaintiff ratified the transactions at issue and cannot now escape their consequences by asserting technical rule violations. Plaintiff's ratification was effected

* As mentioned above, the quoted phrase refers to SEC Rule 15c 1-7. The courts have looked to that definition in treating churning as a violation of Rule 10b-5. See note at 51, supra.

by her action and language, see Arnot v. Union Salt Co., 186 N.Y. 501, 79 N.E. 719 (1906); Angerosa v. White Co., 248 App. Div. 425, 290 N.Y.S. 204 (4th Dep't 1936), aff'd, 275 N.Y. 524, 11 N.E.2d 325 (1937); Walker v. Man, 142 Misc. 277, 253 N.Y.S. 458 (Sup. Ct. N.Y. Cty. 1931); and it was implied, based on her acts and conduct in apparent approval of deGive's actions. Flagg v. Nichols, 202 Misc. 1096, 115 N.Y.S.2d 7 (Sup. Ct. N.Y. Cty. 1952), aff'd, 281 App. Div. 966, 120 N.Y.S.2d 917 (1st Dep't 1953), rev'd on other grounds, 307 N.Y. 96, 120 N.E.2d 513 (1954); Guild v. Hopkins, 271 App. Div. 234, 63 N.Y.S.2d 522 (1st Dep't 1946), aff'd, 297 N.Y. 477, 74 N.E.2d 183 (1947); Walker v. Man, supra; In re Kroll's Estate, 8 Misc.2d 133, 169 N.Y.S.2d 495 (Sur. Ct. 1957).

Plaintiff asserts that there can be no ratification here because plaintiff did not know of the rule violation, arguing that to establish either of the types of a ratification, it must be shown that the principal has full and complete knowledge of all the material facts attending the unauthorized transaction. "Material facts" are, however, "those [facts] which substantially affect the existence or extent of the obligations involved in the transaction, as distinguished from those which affect the values or inducements involved in the transaction." Restatement (Second) of Agency §91 (1958). Comment d to §91 elaborates on this definition of material facts:

"There is no right to rescind a ratification because of ignorance of facts unless such facts so affect the existence and extent of the obligations involved in the transaction that knowledge of them is essential to an intelligent election to become a party to the transaction."

Under the circumstances of this case, plaintiff's ignorance of the manner in which her orders were executed is not a material fact. This information is procedural in nature and was not "essential to an intelligent election [by the plaintiff] to become a party to the transactions." The plaintiff authorized Paul deGive to purchase and sell securities for her account at Dominick. The material facts in each transaction were those concerning the name of the company involved and the transaction price, and ultimately whether the transaction was profitable. Plaintiff was promptly informed of each of these facts, but made no complaint. (See page 7, ¶(d), supra). The fact that she was ignorant of the means which led to these approved transactions is irrelevant. Restatement (Second) of Agency §91, Comment d (1958).

What the plaintiff's various NYSE rule "theories" reduce themselves to is this: a plaintiff may for years acquiesce in, approve, and enjoy the profits generated by a particular type of trading activity. But if she at some point loses money during a period when the same type of trading is employed, she may later search around for any technical violations by her broker of the many rules governing its conduct

and, having found one, hold the broker liable for all her losses. In other words, plaintiff would have her broker be her insurer. This extraordinary contention was properly rejected by the court below.

POINT IV

DEFENDANTS SHOULD BE AWARDED THEIR REASONABLE ATTORNEYS' FEES

A. The Provision For Attorneys' Fees In Sections 9(e) And 18(a) Of The 1934 Act Should Be Implied In A Suit Under Section 10(b) Of The Act

Defendants recognize the general rule in American jurisprudence that in the absence of statutory or contractual provision, attorneys' fees are not recoverable by a victorious party. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967); Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975).

There is no statutory provision which expressly permits a successful party to an action brought under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder to recover attorneys' fees as part of its litigation costs.* However, it is submitted that this Court should

* However, the absence of an express provision for an award of attorneys' fees in 10b-5 cases does not preclude such an award since Congress made no provision for private recovery under 10b in the first place. Mills v. Electric Auto Lite, 396 U.S. 375, 390-391 (1970).

find that the process by which under Section 10(b) and Rule 10b-5 private remedy has been implied requires that recovery of attorneys' fees be allowed.

Sections 9(e) and 18(a) of the Securities Exchange Act of 1934 (the "1934 Act") (15 U.S.C. §78i(e) and 78r(a)) are the two sections under the 1934 Act which specifically authorize private damage actions. Both provide for the recovery of attorneys' fees.* These provisions were inserted by Congress "to deter 'strike' or nuisance actions." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741, reh. denied, 423 U.S. 884 (1975). Since Congress has seen fit to provide a mechanism for awarding attorneys' fees where claims are brought pursuant to the only sections in the 1934 Act (§§9 and 18) which expressly conferred a private cause of action, the same deterrent to "strike" or nuisance suits should equally be available in actions brought pursuant to the judicially implied cause of action under Rule 10b-5.

In Blue Chip Stamps, supra, the Court stated as a major rationale for its decision maintaining the "purchaser-seller" requirement in 10b-5 cases, that the 1933 Act

* §§9(e) and 18(a) leave to the court's discretion the assessment of reasonable attorneys' fees in actions for security price manipulation and misleading statements in documents filed with the SEC. Compare Section 11(e) of the Securities Act of 1933 (the "1933 Act") (15 U.S.C. §77k(e)) which permits the court to assess reasonable attorneys' fees in actions brought in connection with misleading registration statements if it believes the suit or defense was "without merit".

contained an express requirement of that type for suits under Section 11, and that:

"It would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action." 421 U.S. at 736.

One of the "bounds" which Congress placed on the only expressly conferred private causes of action under the 1934 Act was the power of the court to award attorneys' fees to a victorious litigant. A similar "bound" ought to apply to actions brought pursuant to the judicially implied right of action under 10b-5.

B. Attorneys' Fees Are Here Justifiable

1. Plaintiff's Wealth

Conventional wisdom in justifying the "American rule" is that making a loser liable for counsel fees would deter plaintiffs with justifiable claims. Here, however, the plaintiff and her husband are persons of great wealth. No "economic duress" is present.

2. The Baseless Charges Made

The essence of this litigation has been plaintiff's claim that deGive invested her portfolio in a manner contrary to her investment intent. Plaintiff persisted in this claim in the face of the following facts: (1) for years prior to the period complained of deGive had conducted a similar pattern of trading on plaintiff's behalf (A. 780, 801, Op.);

(2) throughout the years, both prior to and during the period complained of, plaintiff and her attorneys were apprised of all trading carried out by deGive on plaintiff's behalf through the mailing to, and receipt by, them of monthly account statements and confirmations of each trade (A. 782, Op.); and (3) through her contacts with deGive, plaintiff was familiar with his technical system and knew that he traded for her based upon it. (A. 784, 801, Op.). All of these were facts known to plaintiff prior to and throughout the course of this litigation.

The heedless abandon of plaintiff's allegations is demonstrated by the belated introduction of a common law fraud count alleging that the defendants represented that they had perfected a "foolproof" system which guaranteed profits. Even before this count was added to the complaint as part of the second amended complaint dated November 30, 1972 (R. 65), plaintiff had testified at her deposition on February 9, 1972 that deGive did not guarantee that every decision he made was going to turn out well:

"Q. Did Mr. deGive guarantee you that every decision he made was going to turn out well?

"A. No. He's good but he's not that good.

"Q. You know that?

"A. He's human."* (R. 149, Van Alen deposition at 114).

* At trial plaintiff affirmed the accuracy of her deposition testimony. (A. 195).

When plaintiff took the stand, she, in support of a fraud claim, testified on direct examination of being shown a "black box" with "wands". (Tr. 45-46). On cross-examination the "magical" device was shown to be a filing box holding deGive's charts. (Tr. 140-42). On cross-examination plaintiff further admitted that she knew the market could go up and down and that "deGive never guaranteed that she'd earn profits". (A. 798, Op., emphasis added).

3. The Multiplicity Of Complaints In This Action

The original complaint, dated December 14, 1971, was followed by a first amended complaint dated April 11, 1972, which was in turn superseded by a second amended complaint on December 1, 1972 and, finally, a third amended complaint dated December 16, 1972, upon which trial was eventually had. With each new complaint, plaintiff changed the allegations supporting her claims or the legal nature of the claims themselves. With each new complaint, the defendants were forced to respond to new and unfounded charges. For example, the periods in which churning was alleged to have occurred underwent revision in each of the amended complaints. The original complaint put in issue the period of February 11, 1969 through March 31, 1970; the first amended complaint went back to include transactions in 1968; the second amended complaint started the alleged churning on February 11, 1969, but eliminated certain transactions complained of in the initial complaint. The

allegation in the first amended complaint that churning occurred in 1968 was flatly contradicted by plaintiff's testimony at trial, where, as the trial court found:

"She testified that deGive handled the accounts very well in 1968." A. 798, Op.

4. Unnecessary Discovery Taken By Plaintiff

Exhaustive and unnecessary discovery was taken by plaintiff. Two officers of the NYSE were deposed by plaintiff but never called at trial. Plaintiff deposed an officer of The Bank of New York; no one from that institution was called by plaintiff at trial. In all, plaintiff took 9 depositions lasting a total of 19 days. Paul deGive alone was deposed for 8 days. Six sets of interrogatories were served on defendants. (R. 34, 75, 76, 103, 106 and 110).

5. The Multiplicity Of Lawsuits

The following actions have been commenced by plaintiff or her husband:

1. Candace Van Alen v. First National City Bank, Paul deGive and Robert Hoguet, 73 Civ. 76, was instituted in January 1973 in the Southern District of New York. The complaint charged FNCB with violations of Regulation U of the Federal Reserve Board in connection with the October 1969 loan made to Van Alen to finance a purchase of securities, with charging usurious rates of interest and breaching a letter of instruction. All three defendants are alleged to have been members of a conspiracy to promote advantages for themselves to the detriment of Van Alen. Two counts seek actual damages of \$54,403, two other counts seek actual damages of \$49,503, and the fifth seeks damages of \$9,800. Two of the counts seek punitive damages in the sum of \$500,000. Plaintiff took four depositions in the FNCB

case. Summary judgment has been granted the bank on all but one of the claims alleged. After Judge Pierce's decision in this case, plaintiff's counsel informed Judge Lasker that "if Judge Pierce's findings are confirmed...then there would remain no issue for trial" as to the remaining count in the FNCB case.

2. James H. Van Alen v. Dominick & Dominick, Inc. and Paul deGive, 72 Civ. 4178, was instituted in the Southern District in October 1972. The complaint in that action sought damages in the sum of \$189,521, supposedly due to the defendants' alleged failure to abide by the stock exchange rules. This action was dismissed by plaintiff pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure on November 22, 1972.

3. James H. Van Alen v. Dominick & Dominick, Inc. and Paul deGive, Index No. 248-1973, in the New York Supreme Court for the County of New York, on December 29, 1972. This action contained similar allegations to those of 72 Civ. 4178, supra, but contained a prayer for punitive damages in the amount of \$1,000,000.

4. Candace Van Alen v. New York Stock Exchange, 73 Civ. 4204, alleges that the Exchange failed to properly "super-vise" Dominick and that it is therefore liable to plaintiff for all losses she suffered in her account there, as well as in her accounts at The Bank of New York and the First National City Bank. She seeks \$599,046 in damages which is identical to the sum she seeks in the case at bar.

Defendants submit that on this record an award of reasonable attorneys' fees as part of the costs recoverable by defendants was justified and that the order of the court below denying such fees should be reversed and attorneys' fees awarded by this Court. In the alternative, since the court below did not state whether it was refusing to exercise its discretion to award attorneys' fees or was of the opinion that it had no such discretion in an action brought under Section 10(b) and Rule 10b-5, this Court should remand the denial of

attorneys' fees to the court below for further consideration.

CONCLUSION

For the reasons stated above, the judgment below in favor of defendants should be affirmed, and the order denying reasonable attorneys' fees to the defendants should be reversed.

Dated: New York, New York
June 6, 1977

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ADDENDA

<u>DATES</u>	<u>TYPE OF TRANSACTION FOR CANDACE VAN ALEN*</u>	<u>TYPE OF TRANSACTION FOR ELEANOR deGIVE**</u>	<u>SUBSTANCE OF APPLICABLE MARKET LETTERS***</u>
2/11/69- 2/14/69	Purchased stocks	Purchased stocks	"Now buying is beginning to increase and such a development after a period of side wise market action normally signals a worthwhile advance." (Letter of 2/11/69)
2/17/69- 2/20/69	Sold stocks	Sold stocks	"[T]o date there has not been sufficient follow through to signal a broad advance. Accordingly, a return to the sidelines is suggested...." (Letter of 2/17/69)
4/30/69- 5/15/69	Purchased stocks	Purchased stocks	"The various intermediate and long term indicators are now reversing a downtrend which has been in effect since last fall. The following stocks are in a favorable technical position." (Letter of 4/30/69)
5/26/69- 5/27/69	Sold stocks	Sold stocks	"The advance which began around the middle of April has failed to produce the normal buying surges and market breadth is negative. The various technical indicators are signalling caution." (Letter of 5/26/69)
10/14/69- 10/29/69	Purchased stocks	Purchased stocks	"Last week the market retested the 800 level in the Dow Jones Industrial average with a noticeable drop in liquidation and an improvement in accumulation of stock...Accordingly, it is my opinion the stocks can be purchased for an intermediate advance." (Letter of 10/13/69)
			"[B]road participation and satisfactory upside volume." (Letter of 10/27/69)
1/28/70- 2/2/70	Sold stocks	Sold stocks two weeks earlier	"The current advance has not broadened sufficiently to be sustained. Traders may return to the sidelines in anticipation of an intermediate down cycle." (Letter of 1/12/70)
			"The intermediate decline continues with steady liquidation. As yet there has not been sufficient action to indicate a bottom area." (Letter of 1/26/70)
3/2/70- 2/3/70	Purchased stocks	Purchased stocks	"For the past four weeks the internal structure of the market has shown improvement, that is, an increasing number of stocks have been forming bases and emerging on the upside... The following industries have formed bases and are turning constructive." (Letter of 3/2/70)

* Based on D. Ex. 98(B).

** Based on P. Ex. 63.

*** Based on D. Ex. 116 and P. Ex. 10.

ADDENDUM 2

Disciplinary Rule DR 7-104 of the Code of Professional Responsibility provides:

DR 7-104 Communicating With One of Adverse Interest.

- (A) During the course of his representation of a client a lawyer shall not:
 - (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
 - (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

ADDENDUM 3

Former Canon 9 of the former Canons of Professional
Ethics provides:

9. Negotiations With Opposite Party

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

ADDENDUM 4

Informal Opinion No. 1140, ABA Committee on
Professional Ethics, provides:

Informal Opinion 1140
Plaintiff's Attorney in Domestic
Relations Case Asking Defendant to
Sign Waiver

January 20, 1970

Your inquiry of (date) has been referred to this Committee for reply. The inquiry, as stated by you, is as follows:

"What violation of professional ethics is involved in obtaining from a defendant in a domestic relations case a 'waiver' such as is widely used in (State)? A copy of such waiver is attached."

The form in question waives the issuance of and service of summons, waives any right to contest the jurisdiction or venue of the court and agrees that the case be submitted to the court in term time or in vacation and without further notice to the defendant. The form also waives notice to take depositions and agrees that depositions may be taken at any time without notice and without formality.

Your inquiry does not specifically state that the defendant from whom the waiver is obtained is not represented by counsel, but that is the inference throughout, and it is upon that assumption that your inquiry will be answered. If the party who is called upon to execute the waiver is represented by counsel, then the waiver should, of course, be presented to his counsel, and if approved by him, there would be no impropriety in its execution. See Code of Professional Responsibility DR 7-104(A)(1); also present Canon 9.

If the party to whom the waiver is presented is not represented by counsel, then both the present Canon 9 and Disciplinary Rule 7-104(A)(2) would seem to prohibit the procedure regarding which you have inquired. The former states:

"It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

The latter states that during the course of his representation of a client a lawyer shall not:

"Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such a person are or have a reasonable possibility of being in conflict with the interests of his client."

The effect of these two provisions appears to be substantially the same, and the provision of the Code of Professional Responsibility therefore simply carries forward the meaning and intent of the present Canon in this respect. Formal Opinion 58, decided under the present Canon, is therefore equally applicable under the Code of Professional Responsibility. This Opinion reads in part:

"The proper procedure for the lawyer representing a party seeking a divorce, and having occasion to communicate with the adverse party not represented by counsel, would be to limit the communication as nearly as possible to a statement of the proposed action, and a recommendation that the adverse party should consult independent counsel."

It is, therefore, the opinion of the Committee under both the present Canons of Ethics and the Code of Professional Responsibility that a violation of proper ethical conduct would be involved in the procedure which you describe.

ADDENDUM 5

Informal Opinion No. 908, ABA Committee on Professional Ethics, provides:

AMERICAN BAR ASSOCIATION
Standing Committee on Professional Ethics

Re: Informal Opinion No. 908 2/24/66
Attorney Interviewing And Taking
A Statement From An Adverse Party,
Who He May Reasonable Expect Will
Retain Counsel But Is Not Yet
Represented

Upon the above, we do not feel that there is anything unethical in the attorney for a potential plaintiff interviewing the potential defendant and taking his statement, if the attorney advises the potential defendant witness that he is conducting the interview and attempting to take the statement in his position as attorney for the claimant.

This is covered in part by Canon 9 which provides as follows:

"A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should be undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

and is likewise covered by Informal Decision #670 which states the following:

"You have inquired whether it is proper for a plaintiff's attorney who has not placed a negligence matter in suit, to make inquiry either personally, or through a private investigator, of the prospective

defendant as to the limits of his liability insurance coverage. We see no objection to an inquiry of this type, provided that the person of whom it is made is not known to be represented by an attorney. Of course, if he is so represented, the inquiry should be directed to his attorney.

Of course, in making the inquiry the lawyer or investigator should be careful to do nothing which would tend to mislead the party..."

On your inquiry as to furnishing the person interviewed with a copy of the statement which he has signed:

This does not appear to be a matter involving professional ethics, although there are probably statutory provisions in most states.

ADDENDUM 6

Formal Opinion No. 117, ABA Committee on Professional Ethics, provides:

FORMAL OPINION 117
(August 27, 1934)

An attorney for the plaintiff may properly interview employees of the defendant who were witnesses to the incident upon which the suit is based so long as no deception is practiced and the employees are informed that the person interviewing them is the attorney for the plaintiff.

CANONS INTERPRETED: PROFESSIONAL ETHICS 9, 15, 39

We are asked if it is unethical for an attorney who has a claim against the owner of a store in favor of a person injured by falling upon a slippery floor in the store to interview the clerks employed there who were the only witness of the accident. The lawyer informs the clerk so interviewed that he represents the claimant and intends to call them as witnesses if their testimony would be helpful to his client.

The opinion of the committee was stated by MR. SUTHERLAND, Messrs. Hinkley, Strother, Carney, Martin, Phillips and Harris concurring.

We see no impropriety in a bona fide attempt to ascertain the truth as to the condition of the floor by questioning the clerks in the store who are supposed to have knowledge of the essential facts, provided no deception is practiced in obtaining their statements and they are informed that the person interviewing them is the attorney for the claimant or represents him.

The ascertainment of the truth is always essential to the attainment of justice and it is the duty of the attorney to learn the facts by every fair means within his reach. Canon 39 recognizes this principle when it states:

If the ascertainment of truth requires that a lawyer should seek information from one connected with or reputed to be biased in favor of an adverse party, he is not thereby deterred from seeking to ascertain the truth from such person in the interest of his client.

In Opinion 12 we held that after a trial resulting in a defendant's conviction, his attorney may properly endeavor to secure a retraction from one of the witness for the prosecution.

In Opinion 101 we held that it is professionally proper for a lawyer representing a client charged with crime to interview witnesses called for the prosecution on the previous trial of another alleged participant.

Canon 9 does not forbid interviews with employees of the opposite party. That Canon states:

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel.

It is the party (not the clerk in the store) who is represented by counsel.

In the opinion of the committee, therefore, no impropriety is involved in the attorney's seeking interviews with the employees as set forth in the inquiry.

ADDENDUM 7

Formal Opinion No. 58, ABA Committee on Professional Ethics, provides:

FORMAL OPINION 58
(December 14, 1931)

An attorney retained by a client who desires a divorce may not ethically confer with the adverse party, not represented by counsel, in an attempt to obtain the adverse party's consent to the divorce.

CANONS INTERPRETED: PROFESSIONAL ETHICS 9

A member of the Association asks whether a lawyer who is consulted by a client who desires to procure a divorce, may properly confer with the adverse party in an attempt to get the adverse party to agree to a divorce and whether he may, at a conference with his client and the adverse party, give the adverse party legal advice in an attempt to secure the adverse party's consent to what will, in effect, be an agreed action. It is, of course, assumed that the adverse party is not at the time represented by counsel.

The committee's opinion was stated by MR. HINKLEY, Messrs. Howe, Harris, Gallert, Strother and Carney concurring.

It would be a violation of Canon 9 for a lawyer consulted by a client who desires to procure a divorce to confer with the adverse party in an attempt to get the adverse party to agree to the divorce.

A conference of the nature indicated in the question might easily lead to the giving of advice to the adverse party. Canon 9 provides that "it is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

The proper procedure for the lawyer representing a party seeking a divorce, and having occasion to communicate with the adverse party not represented by counsel, would be to limit the communication as nearly as possible to a statement of the proposed action, and a recommendation that the adverse party should consult independent counsel.

But the disapproval herein expressed should not be understood as condemning the laudable and proper efforts which an attorney may make to bring about a reconciliation between his client and an adverse spouse not represented by counsel, when such efforts involve no discussion of the facts which furnish, or might furnish, grounds for divorce.

Service of 2 copies of the
within Brief is hereby
admitted this 6th day of
June 19 77
Signed G. Cooper

Attorney for Plaintiff-Appellant
Cross Appellee